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In The

SUPREME COURT OF THE UNITED STATES

No. 74-82

KITTYHAWK, LTD.
ESCO DISTRIBUTING CO.

and

MILES FABRICS OF MEMPHIS, INC.,
Petitioners,

vs.

CITY OF MIDDLETOWN
MIDDLETOWN SHOPPING CENTER, INC.

and

MANUEL D. MAYERSON,
Respondents.

BRIEF OF RESPONDENTS MIDDLETOWN SHOPPING CENTER, INC. and MANUEL D. MAYERSON OPPOSING CERTIORARI

STATEMENT OF THE CASE

Respondents, Middletown Shopping Center, Inc. and Manuel D. Mayerson, adopt the statement of the case as set forth on pages 1, 2, and 3 of the Brief of respondent, City of Middletown, as and for their own.

PETITIONERS' PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1. Petitioners offer insufficient evidence to support their contention that the decision in this case is in conflict with the decision of this Court in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Petitioners, on pages 8 through 11 of their brief, argue that the Middletown, Ohio ordinances do not meet the "fairly debatable" test (*Euclid* v. *Ambler*). In support of their argument petitioners offer only (1) the wording of the ordinance itself and (2) the fact that their property has no highway frontage.

Respondent, City of Middletown, in its brief, deals thoroughly with the uses permitted in the classifications under question discussing the many uses permitted in the "C-2" classification besides strictly highway-associated ones, pointing out the similarity between the Middletown ordinances and those under question in *Euclid* v. *Ambler*, *supra*, which were adopted under identical provisions of the Ohio Revised Code.

In *South Gwinnett Venture* v. *Pruitt*, 491 F. 2d 5 (5 Cir. 1974) the Court affirmed the District Court which had refused appellants relief when their business zoning had been denied. The District Court had held that "it was not the function of federal district courts to serve as zoning appeal boards; that the decision of local zoning authorities is an exercise of judgment legislative in character; and that these decisions are subject to judicial control 'only if arbitrary or if interested parties have been denied procedural due process'." The Court of Appeals, in its opinion, stated:

> "We adhere to the teachings of *Higginbotham* v. *Barrett*, 5 Cir., 1973, 473 F. 2d 745, in which it was held that local zoning is a quasi-legislative procedure, not subject to federal judicial consideration in the absence of arbitrary action. . . . A zoning commission is a quasi-legislative body. It is not required to make findings of fact or state the reasons for the action taken. Its actions are entitled to a presumption of validity. The only question which federal district courts may consider is whether the action of the Zoning Commission is arbitrary and capricious, having no substantial relation to the general welfare. . . ."

Chapter 1141 of the Codified Ordinances of the City of Middletown, Ohio which establishes the "C-2" zone is set forth verbatim in petitioner's brief. It contains no less than nine (9) detailed sub sections setting forth (1) Intent, (2) Principal uses permitted, (3) Conditional uses permitted, (4) Accessory uses permitted, (5) Required conditions, (6) Off-street parking and loading, (7) Height regulations, (8) Lot area and yard requirements, and (9) Maximum floor area. It is submitted that it would be hard to imagine a more detailed and comprehensive set of guidelines to be considered by city officials charged with making specific decisions on the issuance of building permits.

In *Maher* v. *City of New Orleans*, 371 F.Supp. 653 (E.D. Louisiana 1974) the Court stated, at page 664,

> "Most decisions hold, however, that zoning standards need not be specific but may be broad, general standards 'so long as they are capable of a reasonable application and are sufficient to limit and define the Board's discretionary powers.' "

Petitioners parenthetically inject (by footnote) into their argument and challenge whether the Middletown ordi-

nance was in fact comprehensive (Petitioners' brief page 10, footnote 4) without offering a thread of evidence to support their contention. In support of their claim that the ordinance is arbitrary and unreasonable they could have offered in evidence the transcript of those extended proceedings and hearings as they relate to this chapter. They did not offer evidence as to when they had acquired subject property which is certainly prerequisite as stated by the Court of Appeals in *Kroeger* v. *Stahl,* 248 F. 2d 121 (3 Cir. 1957) which held that *the fact that a landowner acquires property after a zoning ordinance is in full force and effect,* although not precluding him from attacking the validity of such ordinance *will weigh heavily against him in evaluating the extent of injury to his property.* (Emphasis added) This principle of law was stated another way by the U. S. Court of Appeals in *C. F. Lytle* v. *Clark,* 491 F. 2d 834 (10 Cir 1974) at page 838:

> "A landowner cannot create his own hardship and then require that zoning regulations be changed to meet that hardship."

In the trial of this case petitioners stipulated that the Middletown Ordinance was adopted in 1968. In their statement of the case they state that they purchased the subject property in early 1972. It would be incumbent upon the petitioners as a prerequisite to even arguing that their physical location made the ordinance arbitrary, capricious, and unreasonable to prove that their property, situated as shown on page 6 of their brief, had no highway frontage when the ordinance was adopted. No zoning ordinance could be enacted that could foresee the possible future transfer of property between private owners within a given district and this was the basis for the holding in *Kroeger* v. *Stahl, supra. A fortiori,* petitioners were charged with knowledge of the

zoning law at the time they purchased their property. They had no right to assume that the zoning would be other than as it existed then.

The Court of Appeals for the First Appellate District of Ohio, whose decision in the instant case, was allowed to stand by the Ohio Supreme Court when they dismissed petitioners' appeal, holding that no constitutional question existed, stated in its opinion:

> "Whether a similarity exists between property given substantially different treatment under a city wide comprehensive zoning ordinance is not a proper justification for holding a zoning ordinance invalid as applied to that property. It is clear that where, as in the instant case, limitations are put upon the use of property under a comprehensive city wide zoning ordinance that the districts established thereby must have definite boundaries. Obviously, property abutting upon the boundaries must be affected to some degree by proximity to the boundaries of the zone. *Such a situation is inevitable unless the entire community is placed in one unrestricted zone.* The courts have consistently refused to interfere with the legislative bodies fixing the boundaries of zones unless the exercise of this function indicates a capricious, arbitrary, and unreasonable action, entirely foreign to any considerations involving the safety, health, morals or welfare of the community. Central Trust Co. v. Cincinnati, 62 O.A. 139; also Zahn v. Board of Public Works, 274 U.S. 325; Willot v. City of Beachwood, 175 Ohio St. 557." (Emphasis added)

In *Central Bank and Trust Co.* v. *City of Miami Beach, Florida,* 392 F. 2d 549 (5 Cir 1968) in a declaratory judgment suit testing the constitutionality of the city's off-street parking requirement, the Court stated, at page 550:

> "Property owners attacking the validity of zoning laws have a high wall to surmount. Forty years ago, in

> the landmark case of Village of Euclid, Ohio v. Ambler Realty Co. (citation omitted) the Supreme Court established a test that severely limits the power of federal courts to declare zoning statutes and ordinances unconstitutional: 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. . . .'"

Respondents contend that at its worst the Middletown Ordinance is fairly debatable and argue that more properly it should be considered a model ordinance setting forth clear and certain guidelines for administration. It is submitted that if a zoning ordinance worded with such particularity as the one in issue be deemed unconstitutional, that other such ordinances, from almost every city, town and hamlet in the country, many less articulate, would be brought in question with the result that the fundamental concepts of *Euclid* v. *Ambler* could no longer be considered controlling.

2. Petitioners offer insufficient evidence to support their contention that the decision in this case is in conflict with the decision of the Court in Nectow v. Cambridge, 277 U.S. 183 (1928).

It has been fundamental in the law of zoning that a city may establish districts mandating the uses to which a property owner may put his property since the decision in *Euclid* v. *Ambler Realty Co., supra.*

It necessarily followed that this Court must define the circumstances in which such a classification might deprive a property owner of his constitutional right to use his land as he wished. That test was set forth by this Court in *Nectow* v. *Cambridge, supra* when it held that to zone

property for a purpose for which it can not be profitably used comes within the ban of the 14th Amendment. Conversely, in *Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927) this Court stated:

> ". . . where property has been zoned for a purpose or purposes for which it can be profitably used, as a part of a comprehensive plan to zone the entire city, which includes all the factors mentioned earlier herein, such act promotes the public health, morals, safety and general welfare of all the residents of the city and does not come within that ban."

In the leading Ohio case, *State ex rel The Killeen Realty Co.* v. *East Cleveland*, 169 Ohio St. 373, 159 N.E. 2d 764 (1959) the Court granted a variance when there was *"no economically feasible use of the land."* (Emphasis added.)

It further quoted, in its opinion, from an annotation, *Constitutional Law in Community Planning*, 20 Law and Contemporary Problems 199 where it is observed:

> "At some undefinable point, regulation of property shades into taking of property, which must be compensated, though it must be conceded that the instances in which the court (United States Supreme Court) has determined that this point was exceeded are rare, and that there have been some examples of extreme legislative encroachments upon property which have gone uncompensated."

In *City of Aurora* v. *Burns*, 319 Ill. 84, 149 N.E. 784 (1927) the court commented, on the implications that must be expected in zoning:

> "No general zoning plan, however, can be inaugurated without incurring complaints of hardship in particular instances. But the individual whose use of his property may be restricted is not the only person to be considered. The great majority, whose enjoyment of

> their property rights requires the imposition of restrictions upon the uses to which private property may be put, must also be taken into consideration. The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development."

In *C. F. Lytle Co.* v. *Clark, supra,* the Tenth Circuit Court of Appeals applied this test when it said, at page 838,

> "The due process and just compensation clauses of the state and federal constitutions do not require that zoning ordinances permit a landowner to make the *most profitable* use of his property. For there to be a taking the landowners must show he has been deprived of *all reasonable uses* of his land."

In *Maher* v. *City of New Orleans, supra,* the United States District Court stated, at page 662:

> "A zoning ordinance, as an exercise of police power, will almost always reduce the value of rights of some individuals; but that does not make it unconstitutional . . . Such a law becomes confiscatory and thus unconstitutional only when it 'goes so far as to preclude the use of the property *for any purpose for which it is reasonably adopted.*' "

Petitioners cite no supporting cases for their contention that they are being deprived of equal protection of the law under that subtitle on page 11 of their brief. Neither did they introduce any evidence that they cannot economically use their property for the purposes for which it is presently zoned. It is submitted that the burden was on them to do just that and that, in absence of such proof,

their argument must fail under the controlling law stated above.

3. The evidence offers no basis for estoppel against the City of Middletown.

Petitioners, on page 13 of their brief, ask the Court to accept as fact a chronology of events on which they claim reliance to their detriment. Before setting forth respondent's citations relative to the law governing estoppel as applied to a municipal corporation, respondents would like to augment these six brief facts set forth by petitioners with references to the record in this case.

(1) Petitioners did in fact purchase the land, as indicated in the statement of their case at page 3, in "early 1972." As noted previously, they also stipulated that the comprehensive zoning ordinance No. 4886 was adopted December 27, 1968 (transcript page 26).

(2) Petitioners did in fact enter into an agreement with their contractor sometime after June 1, 1971 and prior to July 5, 1972 (Testimony of Kittyhawk partner Saylors, transcript pages 94 and 95) for the construction of a commercial building in the amount of $528,000.00. (Testimony of petitioners' architect, transcript page 68.)

(3) Petitioners secured a Certificate of Zoning Compliance from the Zoning Administrator on July 9, 1972 for a "commercial shopping center on Lewis Street" but applicant was told that the use of the Joan Fabric Shop (Petitioner Miles Fabrics of Memphis, Inc.) would not be permitted in this zone. (Testimony of Zoning Inspector, transcript pages 35 and 36.) No Certificate of Zoning Compliance was ever requested or issued for the catalog store use. (Petitioner Esco Distributing Co.) (Testimony of Zoning Inspector, transcript page 37.)

(4) A building permit was issued by the Building Inspector for an A & P store, a fabric shop, a tile and carpet shop, and a drug store immediately after the Certificate of Zoning Compliance was issued. (Testimony of Building Inspector, transcript pages 55 and 59.) An amended building permit was issued in September 1972 (Testimony of Building Inspector, transcript page 60) after petitioners' architect, on April 9, 1972, submitted revised plans to the Building Inspector, deleting two previous tenants and adding Esco Distributing Co. (Testimony of petitioners' architect, transcript pages 66 and 67.) The architect was told by Building Inspector to contact zoning for clarification of the Esco use. (Testimony of Building Inspector, transcript pages 60 and 61.)

(5) Petitioners executed long term leases, with A & P in April, 1972 and Fabric Center in May, 1972 (Testimony of Kittyhawk partner Saylors, transcript pages 89 and 92) and with Esco Distributing Co. on July 31, 1972 (Saylors, transcript page 92).

(6) Petitioners started construction in late July, 1972 (Testimony of Kittyhawk partner Saylors, transcript page 74). Petitioners' architect testified that the building was 55 per cent completed when the amendment to the building plans was made and 90 per cent completed on November 2, 1972, the date of the hearing (Testimony of petitioners' architect, transcript page 67).

Respondent submits the following additional facts from the transcript.

(1) Petitioners received a registered letter on October 16 or 17, 1972 notifying them that the proposed uses by Fabric Shop and Esco were not permitted in a C-2 zone (petitioners' statement of the case, page 4, testimony of Kittyhawk partner Saylors, transcript page 88).

(2) Petitioners were never issued a certificate of occupancy per codified ordinance 1173.05 City of Middletown and none was requested by petitioners (Testimony of Building Inspector, transcript pages 130 and 131) without which use or occupancy of the premises is unlawful (section 1173.05, petitioners' brief, page 35).

Respondents submit that the above testimony proves that petitioners could not have relied on the Certificate of Zoning Compliance which was issued on Jully 9, 1972 when it entered into leases with A & P and the Fabric Shop the previous April and May respectively. Likewise they did not rely on the Certificate of Zoning Compliance before contracting with McGraw Construction Co., their contractor, prior to July 5. They could not have relied on such a certificate in reference to the Esco use since none was ever requested or issued. One might also question the accuracy of the testimony that construction began in late July of a $528,000.00 building and that construction was 55 per cent complete less than two weeks later when petitioners amended their plans to include the Esco requirements.

If it be assumed for purposes of argument that the Certificate of Zoning Compliance for the fabric shop use was improperly issued, even though it was worded "for a commercial shopping center," the specific warnings given to petitioners' agent, the architect, that such use was not permitted in a C-2 zone, coupled with the fact that they must be presumed to know the law, should deny them the opportunity of claiming that the City of Middletown should be estopped from enforcing the ordinance. Even this argument need not be made in regards to the Esco use for which no Certificate of Zoning Compliance was ever issued.

It is submitted that the action by the City of Middle-

town to enjoin the illegal uses commencing with the notification thereof to petitioners on October 16, 1972, a little more than two months after initial construction began, was both prompt and responsible and they could in no way be charged with laches.

In 28 Am.Jur.2d *Estoppel and Waiver* § 130 (1966) at page 798 is contained a succinct statement of the law of estoppel as applied to municipalities.

> ". . . the doctrine of equitable estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs or governmental functions because of an error or mistake of, or because of a wrong committed by, one of its officers or agents which has been relied upon by a third party to his detriment. . . . It has been stated that agency by estoppel has no proper place in the law of municipal corporations and that no estoppel can grow out of dealings with municipal public officers of limited authority in respect of matters as to which such authority has been exceeded."

In an annotation in 6 A.L.R. 2d 960 (1949), *Rights of permittee under illegally issued building permit*, at pages 961 to 964, it is stated:

> ". . . an invalid building permit vests no rights or privileges in the person to whom the permit has been issued. Numerous cases have applied this rule notwithstanding the resultant hardship to the permittee who had begun construction, or in some cases, expended considerable money in reliance upon the permit. The applicable principle . . . is that *every person is presumed to know the extent of power of the municipal authorities.* (emphasis added) . . . This is particularly true when the permit was issued by some administrative official as distinguished from the legislative body of the municipality."

The cases set out in this annotation demonstrate that the invalid permit may be revoked, and proposed construction thereunder prohibited by injunction, or construction which has been started may be stopped, or demolition or removal of the completed structure ordered, notwithstanding the resulting hardship to the permittee who may have acted in good faith.

In an annotation in 1 A.L.R. 2d 338 (1948) *Applicability of doctrine of estoppel against government and its governmental agencies,* at pages 351, it is stated:

> "Ordinarily a municipality is not estopped by a mistake, unauthorized act, laches, dereliction, or wrongful conduct on the part of a public official, and no estoppel can grow out of dealings with municipal public officers of limited authority where such authority has been exceeded."

Many Ohio cases have followed the doctrine set forth in the above annotations and are cited here. The Ohio Court of Appeals in *Spieker* v. *Board of Rapid Transit Commissioners,* 37 Ohio App. 102, 174 N.E. 15 (1930) held that unauthorized acts of city officials cannot result in estoppel against the city. The court quoted the rule at page 107 as follows:

> "On the other hand it is settled that the public, whether exercising its functions through a state or the federal government, or through a municipal corporation, county, town, township, or other governmental agency or instrumentality, cannot be estopped by unauthorized, illegal or fraudulent acts, admissions, conduct, or statements on the part of their officers and agents. . . . Because persons dealing with public officers and agents are bound by the constructive notice of the law and the public records as to the measure of their powers and functions, the public cannot, by the representations of the officers as to this matter, be estopped to deny their authority, even when acting within the

> apparent scope of their official functions; and this rule applies to all persons whatsoever who deal with or claim under the municipality either directly or remotely."

The law of Ohio is clear that the public authority cannot be estopped by the action of a public official, whether condoning other violations of the same law or actually issuing a permit which would authorize a violation of a zoning ordinance.

Thus in *Haba* v. *Cuff*, 28 Ohio Op. 2d 266, 201 N.E. 2d 343 (1963) in which an appeal was dismissed by the Ohio Supreme Court (176 Ohio St. 374) and certiorari denied by this Court (379 U.S. 964) and rehearing denied (380 U.S. 927) the court held:

> ". . . that a township was not estopped from enforcing a zoning regulation with reference to a structure, although the structure had been erected and used for six years in violation of zoning regulations and the township was granted an injunction to prevent the continued violation by such use."

Also see *Kilko* v. *Cleveland*, 60 Ohio L. Abs. 561, 102 N.E. 2d 476 (1951), *Eskridge* v. *Sandusky*, 73 Ohio L. Abs. 568, 136 N.E. 2d 465 (1955), and *Mastroianni* v. *Board of Liquor Control*, 69 Ohio L. Abs. 431, 119 N.E. 2d 147 (1954).

The mere failure of municipal authorities to make complaint of the violation of a zoning ordinance until discovery of the offense does not preclude their right to enforce the ordinance against the violator. Thus a delay in seeking to enjoin the erection of a building in violation of a zoning ordinance until after considerable work has been done thereon has been held not to estop the plaintiffs from maintaining the suit, where they could not be sure until that

time that there would be a violation of the ordinance. 58 Am. Jur. *Zoning* § 192 at page 1045.

In the instant case The City of Middletown and its officers have taken the consistent position throughout the chronology of events that they in no way objected to the design or size of the building erected by petitioners, only to its proposed use for a fabric shop (Miles Fabrics) and for a catalog store (Esco). Petitioners, on the other hand, in the trial of the case, offered no evidence of any construction peculiar to these illegal uses or that construction was accomplished that would have no value for uses permitted in the "D-2" zone. Respondents further contend that there was, in fact, no actual proof of reasonable reliance on any act of a city official. Even if respondents be found wrong in these contentions, the City of Middletown would not be estopped from enjoining petitioners' illegal uses under the controlling case law set forth herein.

CONCLUSION

Petitioners having failed to support their contentions under the controlling case law and having failed to carry their burden of proof against the heavy presumption of validity of the comprehensive zoning ordinances of the City of Middletown, their petition for a writ of certiorari to this Court should be denied.

Respectfully submitted,

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